

BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2018] NZEnvC 206

IN THE MATTER of the Resource Management Act 1991
AND of an application pursuant to s 311 of the Act
BETWEEN TŪPUNA MAUNGA O TĀMAKI
MAKAURAU AUTHORITY
(ENV-2018-AKL-000276)
Applicant
AND AUCKLAND COUNCIL
Respondent

Court: Environment Judge M Harland sitting under s 279 of the Act

Date of Decision: 17 October 2018

Date of Issue: 17 October 2018

DECISION OF THE ENVIRONMENT COURT
ON APPLICATION FOR DIRECTIONS AS TO SERVICE

A: The Court makes the following directions:

- (a) The applicant is to print a public notice in a newspaper(s) of high circulation in the Auckland area every week until the week ending 16 November 2018;
- (b) A public notice is also to be published on the Auckland Council's



website, which is to be arranged in consultation with the Council.

- (c) The public notice is to set out the general nature of the declarations sought and where a copy of the application for declarations may be obtained.
- (d) The period for which notices under s 274 of the Act can be filed is extended until 30 November 2018, to allow for this process of public notification to take place.
- (e) At the end of the notification period the applicant is to file an affidavit of service in accordance with Rule 6.10 of the District Court Rules 2014 setting out the details of the public notification, including when and how notification took place.

REASONS

Introduction

[1] The Tūpuna Maunga o Tāmaki Makaurau Authority has applied for the following declarations from the Environment Court relating to the D14 Volcanic View shafts and Height Sensitive Areas Overlay of the Auckland Unitary Plan (**the Plan**):

Under the Plan, where a proposed building:

- (a) intrudes into a scheduled regionally significant volcanic viewshaft (to which Rule D 14.4.1(A3) of the Plan applies); and
- (b) is also within a height sensitive area (to which Rule D14.4.1(A7) of the Plan applies);

then both Rules D14.4.1(A3) and D14.4.1(A7) apply, and it follows that:

- (c) in accordance with Rule C1.6(2) in Chapter C; General Rules, the activity status of a proposal is that of the most restrictive prevails; and consequently
- (d) such a proposed building is to be assessed as a restricted discretionary activity in accordance with Rule A3 and will require a resource consent.

[2] The grounds for this application for declarations are:



- (a) activity table D14.4.1 sits within the D14 Volcanic Viewshafts and Height Sensitive Areas Overlay of the Plan;
- (b) within Table D14.4.1, Rule D14.4.1 (A3) provides that “Buildings (...) up to 9m in height” that intrude into a regionally significant volcanic viewshaft are a restricted discretionary activity;
- (c) also within Table D14.4.1, Rule D14.4.1(A7) provides that “Buildings up to 9m in height (...)” in a height sensitive area are a permitted activity;
- (d) Rules D14.4.1 (A3) and (A7) are separate provisions and there is no hierarchy between the provisions indicated in the Plan;
- (e) Rule C1.6 relates to the determination of overall activity status of an activity and relevantly states at C1.6(1) that the activity status:

(...) will be determined on the basis of all rules which apply to the proposal, including any rule which creates a relevant exception to other rules.

and at C1.6(2)

(...) the overall activity status of a proposal is that of the most restrictive rule which applies to the proposal.

- (f) The Auckland Council issued a Practice Note on Volcanic Viewshafts and Height Sensitive Areas D14 Overlay in January 2018 which includes guidance on how to read Activity Table D14.4.1;
- (g) That Practice Note states that:
 - (i) the overlay activity table is potentially unclear;
 - (ii) the caveat in rule C1.6(1) that a rule may create a relevant exception to other rules, applies in Table D14.4.1 applies; and
 - (iii) the rows in the bottom part of Table D14.4.1 (including Rule D14.4.1(A7)), create an exception to the rules in the top part of the Table (including Rule D14.4.1(A3));
- (h) To the contrary, the applicant considers that where a proposed building intrudes into a scheduled regionally significant volcanic view shaft and is also within a height sensitive area (**overlap areas**):



- (i) the Plan should be interpreted on its face; and
 - (ii) in accordance with Rule C1.6(2), while both rules apply, Rule D 14.4.1(A3) is the more restrictive, and on that basis the more restrictive activity status (restricted discretionary) must prevail;
- (i) The Practice Note may result in buildings being constructed in the overlap areas without the requisite resource consents and without impacts on the volcanic view shafts being assessed or considered;
 - (j) In light of the Council's Practice Note and the potential uncertainty in the interpretation of the Plan, declarations should be made to resolve that uncertainty and to provide for the proper interpretation and administration of the Plan and the Act; and

Directions sought as to Service

[3] In addition, the applicant has applied under under s 281 of the Act for directions as to service of the application for declarations.

[4] Section 312 of the Act requires an applicant for declaration to serve notice of the application on every person directly affected by it within five working days after the application is made.

312 Notification of application

(1) The applicant for a declaration shall serve notice of the application in the prescribed form ... on every person directly affected by the application.

(2) Every notice required to be served under this section shall be served within 5 working days after the application is made to the [Environment Court].

[5] In the circumstances, the applicant has submitted that it is difficult to identify and serve all the directly affected parties. For example, the declarations sought will apply to all people with property interests in the overlap areas, estimated to amount to more than 3000 people. Further, it is not practicable to identify those persons with current or future development aspirations.

[6] Accordingly, the applicant seeks directions allowing for service to be provided by way of public notice, which it proposes to carry out in consultation with the Council.

[7] The directions sought are that:

- (a) The applicant should provide service by way of a public notice;



- (b) The public notice be placed:
- (i) In a newspaper circulating in the Auckland area; and
 - (ii) On the Auckland Council website (to be arranged in consultation with the Council); and
- (c) The public notice sets out the general nature of the declarations sought and where a copy of the application for declarations may be obtained.

Directions

[8] Having considered the difficulty in identifying and notifying all parties directly affected by this application I consider that it is appropriate that the following directions be made:

- (a) The applicant is to print a public notice in a newspaper(s) of high circulation in the Auckland area every week until the week ending **16 November 2018**;
- (b) A public notice is also to be published on the Auckland Council's website, which is to be arranged in consultation with the Council.
- (c) The public notice is to set out the general nature of the declarations sought and where a copy of the application for declarations may be obtained.
- (d) The period for which notices under s 274 of the Act can be filed is extended until **30 November 2018**, to allow for this process of public notification to take place.
- (e) At the end of the notification period the applicant is to file an affidavit of service in accordance with Rule 6.10 of the District Court Rules 2014 setting out the details of the public notification, including when and how notification took place.



M Harland

M Harland
Environment Judge